Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1312

MARY ANN TURNER,

Petitioner,

—v.—

DEPARTMENT OF EMPLOYMENT SECURITY AND BOARD OF REVIEW OF THE INDUSTRIAL COMMISSION OF UTAH,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH

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IN THE

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OCTOBER TERM, 1974

NO.

MARY ANN TURNER,

Petititoner

-v-

DEPARTMENT OF EMPLOYMENT SECURITY
AND BOARD OF REVIEW OF THE INDUSTRIAL
COMMISSION OF UTAH,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE
OF UTAH

The petitioner, Mary Ann Turner, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Utah entered on February 4, 1975.

Opinion Below

The February 4,1975 opinion of the Supreme Court of the State of Utah has not yet been officially reported. It is set out in the Appendix, infra, pp. 1a.

Jurisdiction

The judgment of the Supreme Court of the State of Utah, refusing to declare unconstitutional Utah Code Ann. §35-4-5(h), was entered on February 4,1975. This Court has jurisdiction pursuant to 28 U.S.C. §1257(3).

Question Presented

Whether Utah Code Ann. §35-4-5(h) which conclusively presumes that every pregnant worker is unfit for gainful employment at the end of the second trimester, violates the fourteenth amendment to the United States Constitution.

Statutory Provision Involved

Utah Code Ann. §35-4-5 (1953) (Replacement Vol. 4b) provides, in pertinent part:

An individual shall be ineligible for benefits . . .

(h) For any week (1) within the twelve calendar weeks prior to the expected date of such individual's childbirth and within the 6 calendar weeks after the date of such childbirth; and (2) during any week of unemployment when it is found by the commission that her total or partial unemployment is due to pregnancy.

Statement of the Case[1]

Petitioner Mary Ann Turner was seperated involuntarily from her employment on November 3,1972 for reasons unrelated to pregnancy. She was then pregnant; the expected date of the birth of her child was June 6,1973.

Petitioner duly filed a proper claim for unemployment benefits with respondent Department of Employment Security. She was in all respects eligible for such benefits; she had sufficient base period wage credits; she had not left her prior employment without good cause; and she was able to and available for work.

On March 22,1973 respondent Department of Employment Security disqualified petitioner from receiving unemployment benefits for a period beginning March 11,1973, twelve weeks prior to the expected date of childbirth, and continuing for six weeks after childbirth. The sole reason for the disqualification was the application of Utah Code

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[1] These facts were stipulated by the parties before the Supreme Court of the State of Utah pursuant to Rule 75(o), Utah Rules of Civil Procedure.

Ann. §35-4-5 which establishes a conclusive presumption that pregnant women are unable to work or unavailable for work throughout the last trimester of pregnancy and for six weeks thereafter. It is undisputed that petitioner's pregnancy did not render her unable to work. In fact, during the last trimester, she worked intermittently on call as a temporary clerical worker.

Petitioner timely appealed to the Appeals Referee and then to respondent Board of Review of the Industrial Commission of Utah. The disqualification was affirmed in both instances.

A direct, timely appeal from the final administrative determination of respondent Board of Review was taken to the Supreme Court of the State of Utah. Affirming the administrative agency ruling, the Utah Supreme Court reasoned that a law denying unemployment compensation to a pregnant woman "violates no constitutional requirement,"[2] because it merely reflects "the bio-

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[2] App. infra, p.4a. As in Cleveland Board of Education v. La Fleur, 414 U.S. 632 (1974) and Stanley v. Illinois, 405 U.S.645 (1972), due process analysis is within the purview of the fourteenth amendment challenge here. Plainly, the Utah Supreme Court found the statute free from any state of federal constitutional flaw.

logical law of nature." Advising petitioner that she had come to the wrong forum, the court suggested she appeal to the 'Great Creator." [3]

The federal question was raised below in the petitioner's Petition For Review, filed in the Supreme Court of the State of Utah, in which the final decision of the Board of Review of the Industrial Commission of Utah is appealed on the basis that:

> the statute . . . is a violation of the Fourteenth Amendment to the United States Constitution.

Reasons for Granting the Writ

I. The Decision Below Is in Direct Conflict With Recent Decisions of This Court.

   a. Utah Code Ann. §35-4-5(h) establishes a conclusive presumption that every pregnant woman, at the end of the second trimester, is unfit for gainful employment.

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[3] App. infra, p. 3a. Cf. Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1873) (concurring opinion) (attributing to "the law of the Creator" woman's unfitness for "many of the occupations of civil life").

b. The decision below, upholding Utah Code Ann. §35-4-5(h) against fourteenth amendment challenge, is irreconcilable with the decision of this Court in Cleveland Board of Education v. La Fleur, 414 U.S. 632 (1974).

Though involuntarily unemployed, petitioner was denied unemployment compensation for the sole reason that Utah Code Ann. §35-4-5(h) categorically denies benefits to pregnant women twelve weeks prior to the expected date of childbirth. Petitioner was ready, willing and able to work; she in fact worked in temporary positions during the period in question. The statute at issue leaves no room for individualized determination, for medical certification of ability to continue working, for consideration of performance on the job. With a single broad stroke, and in total disregard of the applicant's ability to and availability for work, the statute declares all women workers unfit, incapable, incompetent throughout the last trimester of pregnancy.

In Cleveland Board of Education v. La Fleur, 414 U.S. 632 (1974), this Court recognized the invidious character of official classifications that automatically and absolutely disqualify pregnant women from membership in the work force. La Fleur invalidated mandatory maternity leave or forced termination rules that required school teachers to leave the classroom at the fifth of sixth month of pregnancy. Responding to the school board's justification that "at

least some teachers become physically incapable of adequately performing certain of their duties during the latter part of pregnancy," this Court said:

> [T]he provisions amount to a conclusive presumption that every pregnant teacher who reaches the fifth or sixth month of pregnancy is physically incapable of continuing. There is no individualized determination . . . as to any particular teacher's ability to continue at her job. The rules contain an irrebuttable presumption of physical incompetency, and that presumption applies even when the medical evidence as to the individual woman's physical status might be wholly to the contrary. 414 U.S. at 644.

The conclusive presumption of unfitness here is identical to the one at issue in La Fleur.[6] Utilizing rule of thumb

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[6] Significantly, the Utah Supreme Court did not even acknowledge the existence of the La Fleur decision. It ignored petitioner's argument that the statute was constitutionally defective because it excluded all women at the end of the second trimester on the ground that some women in the designated class may be unable to work. Rather, the Court accepted as universally true the unproved assumption that women entering the third trimester are unable to work. It said, "[s]hould a man be unable to work be-

rather than individualized determination, the state insulates from attack unproved assumptions concerning the appropriate place for conspicuously pregnant women.[7] Victorian notions that such women are properly confined at home remain frozen in the law of Utah, because official fiat deprives women of the opportunity to prove those notions false. As in La Fleur, supra, and Stanley v. Illinois, 405 U.S. 645 (1972), the convenient categorical disposition here is irrational and arbitrary, hence violative of due process. See also Vlandis v. Kline, 412 U.S. 441 (1973); United States Department of Agriculture v. Murry, 413 U.S. 508 (1973); L. Tribe, From Environment Foundations to Constitutional Structures: Learning from Nature's Future, 84 Yale L.J. 545, 553-56 (1975).

II. The Decision Below is Inconsistent With The Clear Trend of Federal And State Authority: Guided by This Court's Recent

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cause he was pregnant, the statute would apply to him . . . ." App. infra, p. 3a (emphasis supplied).

[7] The extent to which such assumptions infect the decision below is conspicuous throughout the opinion. The court asserts, "few women would wish to change the situation," and a concurring justice adds "[t]he course of nature with respect to pregnancy is so well known as to require no expatiation." See App. infra, pp. 3a-4a,5a.

Opinions, Federal and State Tribunals and Administrators, With Virtual Unanimity, Have Declared Unconstitutional Laws that Conclusively Presume Pregnant Women Unable To or Unavailable For Work at the End of the Second Trimester.

Laws of the Utah Code Ann. §35-4-5 (h) genre have been identified by the United States Department of Labor (Manpower Administration) as constitutionally vulnerable and inconsistent with federal law and policy proscribing gender discrimination in employment. More than four years ago states were advised by the Department to alter statutory and regulatory provisions that exclude women from unemployment compensation benefits solely on the ground of pregnancy. U.S. Dept. of Labor Unempl. Ins. Program Letter No. 1097 (Dec. 31,1970).

Exclusions similar to Utah's have been declared unconstitutional in an array of recent authority; federal courts UAW v. Taylor, 9 EPD ¶9878 (E.D. Mich. 1974); Jordan v. Meskill, 1A CCH Unempl. Ins. Rep. ¶21,420 (D. Conn. 1973), remanded on other grounds, 496 F.2d 646 (2d Cir.1974); Stickel v. Mason, 1A CCH Unempl. Ins. Rep. ¶21, 415 (D. Md. 1973); Laska v. Garnes, 1A CCH Unempl. Ins. Rep. ¶21,421 (N.D. Ohio 1973); state courts Hanson v. Hutt, 10 CCH Unempl. Ins. Rep.

(Wash.) ¶8530 (Super. Ct. 1973), aff'd, 83 Wash. 2d 195, 517 P.2d 599 (Wash. 1973); Goodman v. Chrysler Corp., 5 CCH Unempl. Ins. Rep. (Mich.) ¶9341 (Wayne Cty. Cir. Ct. 1973); Heier v. DILHR and Lathrop v. DILHR, 10 CCH Unempl. Ins. Rep. (Wisc.) ¶8637 (Wisc. Cir. Ct. 1973); Orner v. Board of Appeals, 5 CCH Unempl. Ins. Rep. (Md.) ¶8387 (Super. Ct. Balt. 1972); Cunningham v. ESC, 4 CCH Unempl. Ins. Rep. (Iowa) ¶8142 (Dist. Ct. Johnson Cty. 1973)); state attorneys general (Michigan: Attorney General's Opinion dated Feb. 18, 1972, CCH Empl. Prac. Guide ¶5051; Oklahoma: Attorney General's Opinion No. 72-211, Nov. 22, 1972, 8 CCH Unempl. Ins. Rep. (Okla.) ¶8144; Pennsylvania: Attorney General's Opinion No. 9, Feb. 7,1974, CCH Empl. Prac. Guide ¶5220).

III. The Decision Below and the State Statute It Upholds Conflict With the Objective of the Federal Unemployment Insurance Program and Therefore With the Supremacy Clause of the Federal Constitution.

The Utah unemployment insurance law was enacted pursuant to and is financed in conjunction with the federal unemployment insurance program. See 42 U.S.C. §§501 et seq., 1103, 1104; 26 U.S.C. §3301 et seq.; Utah Code Ann. §35-4-9.

This Court identified the core purpose of all federal-state cooperative unemployment insurance programs in California Dept. of Human Resources Development v. Java,

402 U.S. 121, 130 (1970):

> The objective of Congress [in enacting the unemployment compensation insurance program] was to provide a substitute for wages lost during a period of unemployment not the fault of the employee.

As indicated in UAW v. Taylor, supra, and Goodman v. Chrysler Corp., supra, categorical exclusion of workers at the end of the second trimester of pregnancy frustrates and impedes the stated federal law policy. See also U. S. Dept. of Labor Unempl. Ins. Program Letter No.1097 (Dec. 31,1970). Accordingly, the exclusion fails under the supremacy clause, art. IV, cl. 2, of the Federal Constitution.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 1975

APPENDIX

IN THE

SUPREME COURT OF THE STATE OF UTAH

MARY ANN TURNER,

Plaintiff,

-v-

DEPARTMENT OF EMPLOYMENT SECURITY AND BOARD OF REVIEW OF THE INDUSTRIAL COMMISSION OF UTAH,

Defendants.

No. 13395

F I L E D
February 4,1975

Allan E. Mecham,
Clerk

ELLETT, Justice:

The plaintiff herein appeals from a denial of unemployment benefits for 18 weeks, 12 before and 6 after delivery of her child. The parties stipulated to the facts of this case, to wit: Mrs. Turner was separated involuntarily from her work for reasons not related to pregnancy. She drew unemployment compensation until 12 weeks before the expected date of the birth of her child and again commencing 6 weeks thereafter. She was entitled to 36 weeks pay during her year, but due to the provisions of the statute relating to pregnancy, she was able to collect for only 30 weeks.

The statute in question[1] reads:

> An individual shall be ineligible for benefits . . .
>
> * * *
>
> (h) For any week (1) within the twelve calendar weeks prior to the expected date of such individual's childbirth and within the 6 calendar weeks after the date of such childbirth; and (2) during any week of unemployment <u>when it is found by the commission that her total or partial unemployment is due to pregnancy</u>. [Emphasis added.]

Mrs. Turner attacks the statute above set out as being unconstitutional under Art. I, Sec. 2, of the Constitution of Utah, which reads:

> All political power is inherent in the people; and all free governments are founded on their authority for their equal protection and benefit, and they have the right to alter or reform their government as the public welfare may require.

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[1] Sec. 35-4-5, U.C.A. 1953 (Replacement Vol. 4b).

She also claims that the statute is in violation of Art. IV, Sec. 1, which reads:

> The rights of citizens of the State of Utah to vote and hold office shall not be denied or abridged on account of sex. Both male and female citizens of this State shall enjoy equally all civil, political and religious rights and privileges.

The question she poses is this: Is the statute set out above void in that it denies to her rights which are given to males?

We do not think so. Should a man be unable to work because he was pregnant, the statute would apply to him equally as it does to her. What she should do is to work for the repeal of the biological law of nature. She should get it amended so that men shared equally with women in bearing children. If she could prevail upon the Great Creator to so order things, she would be guilty of violating the equal protection of the law unless she saw to it that man could also share in the thrill and glory of Motherhood.

It is just as bad to treat unequal things as equals as it is to treat equal things unequally. In the matter of pregnancy there is no way to find equality between men and women. The Great Creator so ordained the difference, and there are few

women who would wish to change the situation.

There is nothing in the Constitution which guarantees unemployment compensation to any person. To deny a pregnant woman pay for not working during her pregnancy violates no constitutional requirement.

The ruling of the Commission is affirmed. No costs are awarded.

WE CONCUR:

R. L. Tuckett, Justice

Richard J. Maughan, Justice

CROCKETT, Justice: (Concurring specially)

I concur with the main opinion, but add some observations without intending any disparagement thereof. I realize the likelihood that its underlying rationale gets to the core of the problem and disposes of it in a more adroit way than I may appreciate. Nevertheless, for my own purpose, I state two propositions which I think support the decision of the Commission and the affirmative thereof by the main opinion.

The purpose of the unemployment compensation system is to provide compensation for persons who are involuntarily unemployed and who are available for employment.[1]

The course of nature with respect to pregnancy is so well known as to require no expatiation. I think the restriction of compensation during the 12 weeks before and 6 weeks after delivery of a baby is a reasonable requirement, in harmony with the above stated purpose of the stature;[2] and a safeguard against possible improper predations on the fund. There are many burdens involved in the bearing and rearing of children, which must be borne by those who

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[1] Section 35-4-4(c), U.C.A. 1953; Martinez v. Board of Review, Dept. of Employment Security, 25 Utah 2d 131, 477 P. 2d 587.

[2] That pregnancy is a valid basis for different classification and treatment of individuals see Geduldig v. Aiello,____ U.S. ____, 94 S.Ct. 2485 (1974).

take on that responsibility, or in certain exigencies, assisted by other governmental programs. But the system for compensation for persons involuntarily unemployed who are available for work was not intended nor designed to extend to that area.

Henriod, Chief Justice, concurs in the views expressed in the concurring opinion of Mr. Justice Crockett.

No. 13395

IN THE
SUPREME COURT OF THE STATE OF UTAH

Claim No. 73-BR-769

MARY ANN TURNER
SSA NO. 528-78-8823,

Plaintiff,

-v-

DEPARTMENT OF EMPLOYMENT SECURITY, AND BOARD OF REVIEW OF THE INDUSTRIAL COMMISSION OF UTAH,

Defendants.

PETITION FOR REVIEW

Case No. 13395

Plaintiff in above entitled action hereby files Petition for Review from the final decision of the Board of Review of the Industrial Commission of Utah, Claim No. 73-BR-769. Plaintiff is appealing the decision of the Board of Review on the basis that the statute relied upon by the Board of Review is in violation of the Fourteenth Amendment to the United States Constitution and a violation of the Utah Constitution.

Dated this 18th day of July, 1973.

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IN THE

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MARY ANN TURNER,

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DEPARTMENT OF EMPLOYMENT SECURITY AND BOARD OF REVIEW OF THE INDUSTRIAL COMMISSION OF UTAH

Respondents.

BRIEF IN OPPOSITION TO GRANTING A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH

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Respondents.

BRIEF IN OPPOSITION TO GRANTING A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH

The respondents, Department of Employment Security and Board of Review of the Industrial Commission of Utah respectfully urge that a writ of certiorari should not issue to review the Judgment of the Supreme Court of the State of Utah entered on February 4, 1975.

QUESTION PRESENTED

Respondents consider the question presented to be whether the limitation of Utah Code Annotated § 35-

4-5(h) (1) against extending unemployment insurance benefits to individuals in near-term pregnancy and immediately thereafter is sustainable State action under the equal protection requirement of the fourteenth amendment to the United States Constitution. The statute in question neither expresses nor requires any presumption about the fitness of pregnant individuals for work as asserted in the petition.

STATUTORY PROVISION INVOLVED

The part of Utah Code Annotated § 35-4-5(h) which was applied to the petitioner and is therefore pertinent hereto, provides:

> An individual shall be ineligible for benefits . . .
> (h) For any week (1) within the twelve calendar weeks prior to the expected date of such individual's childbirth and within the 6 calendar weeks after the date of such childbirth;

STATEMENT OF THE CASE

The statement of facts in the case by the parties before the Supreme Court of Utah is as follows:

1. The appellant duly filed a proper claim for unemployment benefits, had sufficient base period wage credits and was otherwise eligible, except for pregnancy disqualification at issue in the case.

2. The appellant was separated involuntarily from her work on November 3, 1972 for reasons unrelated to pregnancy. She was pregnant at the time, however, and expected date of the birth of her child was established by her doctor as June 6, 1973. In application of Section 35-4-5 (h), Utah Code Annotated, 1953, she was disqualified by the Department of Employment Security on March 22, 1973, from receiving unemployment benefits for a period beginning March 11, 1973, twelve weeks preceding the expected date of childbirth, and continuing for six calendar weeks after the date of childbirth. The disqualification was affirmed by the Appeals Referee on April 19, 1973, and by the Utah Board of Review on June 25, 1973.

3. After filing her claim for unemployment benefits the appellant worked intermittently on call as a clerical worker for a manpower service.

Upon a direct, timely appeal by the petitioner in which the federal question was raised, the Utah Supreme Court held the limitation of Utah Code Annotated § 35-4-5(h) (1) against extension of insurance benefits to pregnant individuals in the described time period to be a proper exercise of legislative authority under the equal protection provisions (Article I, Section 2) and equality of rights provisions (Article IV, Section 1) of the Constitution of Utah. Beyond the state constitutional aspect of the case the court did not refer to the federal question, but affirmed the decisions below upon the conclusion that the limitation upon benefits ". . . violates no constitutional requirement."

No petition for rehearing was filed although such was permissible under Utah Rules of Civil Procedure, Rule 76(e) and (f) within 20 days after the filing of the decision of the Supreme Court, or thereafter on approval of any justice upon good cause shown.

REASONS FOR DENYING THE WRIT

I. THE RESULT BELOW DEALS WITH A QUESTION ALREADY DETERMINED BY THIS COURT IN *GEDULDIG v. AIELLO*, 417 U.S. 484 (1974), AND EARLIER RELATED CASES, AND IS WHOLLY IN ACCORD WITH THOSE DECISIONS. LIKE THAT IN *GEDULDIG*, THE STATUTORY CLASSIFICATION IN THIS CASE IS A LEGISLATIVE DETERMINATION AS TO THE EXTENT OF COVERAGE FOR BENEFITS OF A STATE SOCIAL WELFARE SYSTEM; ITS INSURANCE PRINCIPLES REQUIRE A BALANCING OF BENEFIT COSTS AGAINST REVENUES; THE BASIS OF THE COVERAGE LIMITATION IS OBJECTIVELY DEFINABLE; AND NO PRESUMPTION ABOUT PREGNANCY AND FITNESS FOR WORK IS MADE NOR REQUIRED.

The classification upheld by this Court in the *Geduldig* case was a provision of the California unemployment compensation disability insurance law which denies benefits to women for disability incident to normal pregnancy and childbirth whereas it allows benefits to women and men for virtually all other disabilities.[1]

That law and the Utah provision involved here have close similarities in light of the elements noted by this Court material to its decision. Basic among these is that each was established, as this Court said in *Geduldig*, ". . . as an insurance program that was to function essentially in accordance with insurance concepts." 417 U.S. 484, 492. Each is self supporting upon the balancing of revenues and benefit costs built into the system. In neither case can the legislative limitation on benefits coverage be broadened without increasing the rates required to support the system.

With regard to coverage of its unemployment insurance benefits, Utah has done precisely as California did, in the description of this Court, about disability insurance benefits:

> Although California has created a program to insure most risks . . . it has not chosen to insure all such risks . . . This Court has held that, conisstently with the Equal Protection Clause, a State ". . . may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind . . . The legislature may select one phase of a field and

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[1] §2626 California Unemployment Insurance Code provides: " 'Disability' or 'disabled' includes both mental or physical illness and mental or physical injury. An individual shall be deemed disabled in any day in which, because of mental or physical condition, he is unable to perform his regular or customary work. In no case shall the term 'disability' or 'disabled' include any injury or illness caused by or arising in connection with pregnancy up to the termination of such pregnancy and for a period of 28 days thereafter."

apply a remedy there, neglecting the others . . ." 417 U.S. 484, 494-495. (Citing *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955) and *Jefferson v. Hackney*, 406 U.S. 535 (1972).

The California program before this Court in *Geduldig* and the Utah program in this case are both social welfare programs, distinguished in Equal Protection doctrines from other statutory classification problems. As the Court said in *Geduldig*:

> *Particularly with respect to social Welfare programs*, so long as the line drawn by the State is rationally supportable, the courts will not interpose their judgment as to the appropriate stopping point. "The Equal Protection Clause does not require that a state must choose between attacking every aspect of a problem or not attacking the problem at all." 417 U.S. 484, 495. Citing *Dandridge v. Williams*, 397 U.S. 471, 486-487 (1970) (emphasis supplied).

In its unemployment insurance social welfare program, the State of Utah has a no less legitimate interest than does California as to its unemployment insurance disability program. Regarding the latter, the Court pointed out in *Geduldig* the legitimate interest of California in maintaining the self-supporting nature of its program, in using resources so as to maintain an adequate benefit level, and maintaining contribution rates at a level not unduly burdensome. 417 U.S. 484, 496.

The foregoing application of the *Geduldig* case rationale to the present case demonstrates the close analogy between the two situations and the State interest in the coverage limitation in each instance.

Finally, it should be noted that in each act the basis of ineligibility is objectively definable. This Court also observed in the*Geduldig* case that normal pregnancy is an objectively definable physical condition and that, lawmakers are constitutionally free to include or exclude pregnancy from coverage of legislation such as this on any reasonable basis.

II. SINCE *GEDULDIG V. AIELLO* THERE HAS BEEN A UNIFICATION OF AUTHORITY AMONG LOWER COURTS ABOUT THE APPLICATION OF CONSTITUTIONAL PRINCIPLES TO GENDER-RELATED CLASSIFICATIONS.

After some earlier uncertainty as to the standard for judicial scrutiny to be applied in cases of statutory classifications involving pregnancy, the *Geduldig* case has brought obvious clarification. The case of *Hanson v. Hutt*, 83 Wash. 2d 195, 517 P. 2d 599 (1974), and the lower Federal court cases and early opinions of State Attorney's General, etc., cited by the petitioner would, no doubt, be decided and written differently since the *Geduldig* case.

In the *Hanson* case the Washington State Court relied heavily upon *Frontiero v. Richardson*, 411 U.S. 677 (1973) to decline application of the traditional standard of review and to apply a rigorous scrutiny adverse to the State unemployment insurance pregnancy limitation on the grounds that (1) a pregnancy classification is per se discrimination against women on the basis of sex, and (2) sex discrimination is an inherently

suspect classification. This despite the fact that *Frontiero* involved neither a pregnancy classification nor a social welfare program issue. The principles of the *Geduldig* case, involving both of these, would obviously be more applicable than was *Frontiero*.

An indication of the unsettled state of doctrine prior to *Geduldig* is in the opinions of Attorney's General cited in the petition.[2] The virtually verbatim opinions released in Michigan and Oklahoma in 1972 dwelt largely upon statutory discountenance of sex discriminations. Each made the erroneous assumption that a statutory pregnancy classification is per se a sex discrimination and is, therefore, of presumed unconstitutionality.

The Pennsylvania Attorney's opinion dealt with the statutory constraints upon the pregnancy provision and did not reach the constitutional question.

By contrast with these earlier declarations, the several pertinent decissions of lower Federal courts subsequent to the *Geduldig* decision and applying that decision show impressive consistency in dealing with constitutional issues involving pregnancy or gender in statutory classifications. Thus, *Crawford v. Cushman*, 378 F. Supp. 717 (D. Vermont, 1974) upheld, under Equal Protection challenge, the Marine Corps requirement for

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[2] Michigan: Attorney General's Opinion dated Feb. 18, 1972, CCH Empl. Prac. Guide 5501; Oklahoma; Attorney General's Opinion No. 72-211, Nov. 22, 1972, 8 CCH Unempl. Ins. Rep. (Okla.) 8144; Pennsylvania: Attorney General's Opinion No. 9, Feb. 7, 1974, CCH Empl. Prac. Guide 5220.

discharge in event of pregnancy, noting that the statute does not operate against women as a class but reaches only those who become pregnant. *Kohr v. Weinberger*, 378 F. Supp. 1299 (E.D. Pa., 1974) upheld the Social Security allowance of benefit computation upon three years less requirement for women than for men. The court, applying the rational basis test, observed that the *Geduldig* case and *Kahn v. Shevin*, 416 U.S. 351 (1974), following *Royster Guano Co. v. Virginia*, 253 U.S. 412 (1920), ". . . make it clear that the Supreme Court has not followed the close judicial scrutiny test in fifth and fourteenth amendment cases dealing with alleged discriminations based on gender." 378 F. Supp. 1299, 1303. In *Bond v. Virginia Polytechnic*, 381 F. Supp. 1023 (W.D. Va. 1974) the court upheld, as to Equal Protection requirements, limitations upon a state university student health plan which provided numerous other free services but did not provide pap tests or gynecological examinations. Citing *Geduldig*, the court noted the State interest in maintaining the self-supporting nature of the program and reiterated its understanding that "The Equal Protection Clause does not require that a state must choose between attacking every aspect of a problem or not attacking the problem at all." 381 F. Supp. 1023, 1024. In *Communications Workers of America v. American Telephone and Telegraph Co.*, 379 F. Supp. 679 (S.D. N.Y. 1974) the court cited *Geduldig* to the effect that distinctions involving pregnancy do not per se constitute discriminations on the basis of sex or gender, and dismissed (with leave to re-file) complaints defective in their reliance upon the former presumption character-

izing pregnancy classifications conclusively as sex discriminations.

In two other instructive recent decisions, Federal courts noted that while under the clarified equal protection requirements, per *Geduldig*, there need only be a reasonable basis for State application of a pregnancy classification, such a limitation in the fourteenth amendment does not impede the enforcement of more stringent implementing statutory requirements as these may be enacted by Congress. *Vineyard v. Hollister Elementary School District No. 6*, 64 FRD 580 (N.D. Cal. 1974) invalidated the school district maternity leave requirements as contrary to Title VII of the Civil Rights Act of 1964. *Satty v. Nashville Gas Co.*, 384 F. Supp. 765 (M.D. Tenn. 1974) struck down the company maternity leave policy under the same act, referring to the enacting power of Congress under the Commerce Clause.

III. THE QUESTION PRESENTED IN THIS CASE IS READILY DISTINGUISHABLE FROM THAT INVOLVED IN *CLEVELAND BOARD OF EDUCATION v. LeFLUER*.[3]

The petition emphasizes the failure of the Utah Court to rely upon or acknowledge the *Cleveland* case in dealing with the pregnancy classification at issue. The petition does not cite or explain *Geduldig v. Aiello*, although the Utah Court opinion cited that case and the case was central to the position of the defendant before that court. It should be noted, too, that the plaintiffs

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[3] 414 U.S. 632 (1974).

before the Utah Court did not cite the *Cleveland* case although it was earlier than *Geduldig*. Neither was the *Cleveland* case cited in the opinions given by this Court in *Geduldig*.

As has been shown, there is a close analogy between the circumstances and the basis of the statutory scheme in *Geduldig* and the present case. By contrast, there is a fundamental dissimilarity between the basis of this case and that of *Cleveland v. LeFluer*.

The latter turned upon a requirement for summary termination of teachers in on-going employment, without recourse, solely because of their pregnancy. This Court quite necessarily invalidated the mandatory separation scheme because it *did* require as an intrinsic part of its logic the application of an irrebuttable presumption against the employability of such teachers because of their pregnancy.

The Utah law makes no such presumption and it does not require any such rationale as the basis for its operation. Rather, it is explainable as a rational expression of State policy on entirely different grounds.

The *Cleveland* case involved employment rights and interests as weighed against the employer's concern for the teachers' physical ability to perform and for the assured continuity of classroom instruction. The present case balances a demand for social welfare benefits beyond the legislative coverage provided, against the State interest in limiting coverage of the system and thereby maintaining solvency through a parity of revenues and

benefit costs. The State policy implicit in the limitation of coverage rests for its rationale, not upon the employability or lack thereof of pregnant individuals, but upon a larger scheme founded upon selection or exclusion of risks upon insurance principles. Like California, Utah insures many unemployment risks, but not all such risks. Excluded, in addition to near-term pregnancies, are students, pensioners, the voluntarily unemployed, those unemployed by their own misconduct, those unemployed for domestic reasons, fraud feasors, strikers, etc. Obviously these are neither all employable nor all unemployable and no categorical presumption is made about them in that regard one way or another.

Perhaps the analogy could be extended further, but the foregoing may be sufficient to distinguish the *Cleveland* decision and to illustrate the abundance of rational support for the legislative determination as to the coverage of the Utah unemployment insurance program.

What this Court said in the conclusion of the *Geduldig* case is applicable to the present case:

> "The State has a legitimate interest in maintaining the self supporting nature of its insurance program. Similarly, it has an interest in distributing available resources in such a way as to keep benefit payments at an adequate level . . . These policies provide an objective and wholly non-invidious basis for the State's decision not to create a more comprehensive insurance program than it has. There is no evidence in the record that the selection of the risks insured by the program worked to discriminate against any definable group or class . . . There is no risk from which men are protected and women are not. Likewise

> there is no risk from which women are protected and men are not." 417 U.S. 484, 496-497.

IV. THE UTAH LAW ACCORDS WITH THE SUPREMACY OF FEDERAL LAW SINCE CONFORMITY TO FEDERAL LAW IS THE BASIS FOR ENACTMENT OF THE STATE PORTION OF THE JOINT FEDERAL-STATE UNEMPLOYMENT INSURANCE SYSTEM, AND CONTINUED CONFORMITY IS CERTIFIED UNDER STANDARDS PRESCRIBED BY CONGRESS.

It is true, as petitioners observe, that there are numerous communications such as Unemployment Insurance Program Letters within the Federal-State unemployment insurance system suggesting the consideration of various improvements in program design or content. Such letters number more than 1300 to date. These pertain to numerous subjects, few of which are mandatory upon the states. The few in the latter group, unlike the letter cited by petitioners, are clearly denominated to the states as required for conformity and the Federal statutory basis of such requirement is set forth together with required effective dates. Such mandatory instructions usually also include sample or model statutory language to be considered by State legislatures.

Congress has left no open question as to the applicable standards of conformity required of State laws in the cooperative unemployment insurance system for certification of such laws by the Secretary of Labor and

for the qualification of State employers for an offset against Federal payroll taxes.

The Federal conformity requirements for State unemployment insurance laws are contained in 26 U.S.C. § 3304 and 42 U.S.C. § 503. The former provides that the Secretary of Labor shall approve any State law which he finds meets the specified standards. Thirteen standards are prescribed, eleven of which pertain to the payment or denial of unemployment benefits. Summarizing, these require that benefits under the State law (1) be paid through approved State agencies only, (2) be withheld for the first two years after the initiation of the employer tax system, (3) be not denied for refusing certain described new work, (4) be paid or denied workers in higher education under specified conditions, (5) be conditioned at the end of a benefit year upon new qualifying work, (6) not be denied to a claimant in training with State approval, (7) not be denied or reduced by a State because the filing is in another state, (8) be proved upon combined wages between or among States, (9) not be denied by total cancellation of wage credits except upon specified grounds, (10) be payable on an extended basis in accord with the Federal-State Extended Unemployment Compensation Act of 1970, and (11) be payable to local government workers of electing units on the same basis as to other workers.

In addition to the foregoing, 42 U.S.C. § 503 (a) contains Congressional standards limiting the Secretary of Labor against certifying (for Federal funding) the otherwise approved law of any State unless ten additional requirements are met, three of which pertain to

the payment of unemployment benefits. The three are (1) that benefits be administered under merit personnel standards reasonably calculated to insure full payment of benefits when due, (2) that benefits be paid solely through the approved State agency, and (3) that benefit eligibility be adjudicated upon fair hearing procedures.

The provisions of 42 U.S.C. 503 (b) establish the procedures for notice to the State and opportunity for hearing in the event of a challenge by the Secretary as to the conformity of a State law to Federal requirements. Such hearing is made a prerequisite to a finding of non-conformity.

Conformity issues not initially raised by the Secretary may, of course, arise in the course of litigation in the courts. Since Congress has spoken definitively as to the requirements for conformity, these issues would necessarily be in cases where the Secretary is enlightened by the Court as to a meaning of the Congressional requirements not theretofore recognized by the Secretary. Such a case was *California Dept. of Human Resources v. Java*, 402 U.S. 121 (1970) in which this Court held that the established Congressional requirement in 42 U.S.C. § 503 (a) for State payment of benefits "when due" precluded the interruption of an individual's on-going benefits by a challenge to eligibility unless prior to such interruption the claimant is afforded an opportunity to confront the issues and be heard.

The foregoing observations serve to illustrate the cooperative nature of the Federal-State relationship which is in the Employment Security system. Such co-

operation underlines the essential nature of the principle recognized by this Court in the case of *Jos. E. Seagram and sons, Inc. v. Hotstetter*, 384 U.S. 35, reh. den. 384 U.S. 967 (1966), "In this as in other areas of coincident federal and state regulation the 'teachings of this Court's decisions . . . enjoin(s) seeking out conflicts between state and federal regulation where none clearly exists.'" 384 U.S. 35, 45, citing *Huron Cement Co. v. Detroit*, 362 U.S. 440, 446.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

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MARY ANN TURNER,

Petitioner,

—v.—

DEPARTMENT OF EMPLOYMENT SECURITY and BOARD OF REVIEW OF THE INDUSTRIAL COMMISSION OF UTAH,

Respondents.

PETITIONER'S REPLY BRIEF

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DEPARTMENT OF EMPLOYMENT SECURITY AND BOARD OF REVIEW OF THE INDUSTRIAL COMMISSION OF UTAH,

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Petitioner's Reply Brief

To avoid collision with this Court's decision in Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974), respondents have abandoned the prime justification for the statutory classification tendered in the court below, i.e., the relationship of pregnancy to "employability." Their Brief in Opposition hypothesizes a wholly different legislative rationale, one patterned on the Court's opinion in Geduldig v. Aiello, 417 U.S. 484 (1974).

Before the Utah Supreme Court, respondents stated:

> [N]ear term pregnancy is an endemic condition relating to employability and hence is not covered by the program. Defendants' Brief at 11 (emphasis supplied).

That court embraced respondents' defense of the classification based on the assumed relationship between pregnancy and "employability." It stated:

> Should a man be unable to work because he was pregnant, the statute would apply to him. . . . App. to petition at 3a (emphasis supplied).

In stark contrast to their former position, and without any reference to legislative history or the grounds of decision in the Utah forum, respondents now disclaim the "employability" justification and substitute for it "insurance principles":

> The State policy implicit in the limitation of coverage rests for its rationale, not upon employability or lack thereof of pregnant individuals, but upon a larger scheme founded upon selection or exclusion of risks upon insurance principles. Brief in Opposition at 12 (emphasis supplied).

At the very least, this belated articulation of state purpose should attract close scrutiny. For respondents' initial formulation, the one accepted by the Utah Supreme Court, suggests "the possible role of outmoded taboos" in shaping the legislature's judgment. Cf. Cleveland Board of Education v. LaFleur, supra, at 641 n.9.

This case, like LaFleur, involves the right of pregnant women fully fit to work [1/] to count as full members of the labor force. It does not involve, as Aiello did, risk coverage choices for state disability insurance purposes. No presumption as to the ability or disability of pregnant women was involved in Aiello. Such presumption

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1/ Not as persons whose current commitment to gainful employment is nonexistent or highly problematic: "students, pensioners, the voluntarily unemployed . . . fraud feasors, strikers, etc." Brief in Opposition at 12.

clearly, and illegally, operates here. 2/

Finally, respondents' old and new rationalizations for the challenged classification underscore the need of lower courts for clear statement by this Court whether LaFleur or Aiello controls the rights of pregnant women while they remain fit and capable workers. 3/

CONCLUSION

The petition for certiorari should be granted.

2/ Like the presumption operative in LaFleur, and unlike the categorization upheld in Weinberger v. Salfi, 95 S. Ct. 2457 (1975), the statute here at issue directly burdens the exercise of "protected freedoms" and arbitrarily impinges upon a "vital area" of an individual's "constitutional liberty." LaFleur, supra, at 640.

3/ It is undisputed that petitioner's pregnancy did not render her unable to work during the period for which she claimed benefits.

Respectfully submitted,

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